(2009) 11 OHC CK 0061

In the Orissa High Court

Case No : O.T.A.P.L. No. 28 of 2009

Jagannath Plastipack Ltd. APPELLANT

Vs

C.C.E., C and S.T., Bhubaneswar-I RESPONDENT

Date of Decision : 20-11-2009

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35F, 35G(2)

Citation : (2011) 23 STR 81

Hon'ble Judges : I.M. Quddusi, Acting C.J.;S. Panda, J

Bench : Division Bench

Advocate : S.K. Mohanty, for the Appellant; Gautam Mukherjee, Counsel, for the Respondent

Judgement

1. Heard Shri S.K. Mohanty, learned counsel for the appellant and Shri Gautam Mukherjee, learned counsel for the revenue.

2. By means of this appeal u/s 35G(2) of the Central Excise Act, 1944, the appellant has prayed for quashing the orders dated 17-3-2009 and 24-7-2009 passed by the Tribunal and the order dated 18-8-2009 passed by the Commissioner (Appeals).

3. The appellant preferred appeal along with stay application against Order in Original No. Addl. Comm/B-I/CE/03/2007 dated 20-11-2007 passed by the Additional Commissioner, Central Excise, Customs and Service Tax, Bhubaneswar-I. Vide stay order dated 21-8-2008 the Commissioner (Appeals) passed the following orders.

It is observed from the prima facie examination of the case that, there does not appear to be any ground for exercising full waiver of duty and therefore, I direct the appellant to deposit Rs, 4,00,000/- (Rupees four lakh only) towards duty before 8th September, 2008 and report compliance to this office. However, if the appellant fails to comply with these directions, their main appeal shall be liable to dismissed for non-compliance of Section 35F of the Central Excise Act, 1944. On deposit of this amount, the requirement of pre-deposit of balance amount of duty and penalty imposed on the appellant shall be dispensed with and the appeal will be decided on merit. Considering the date of appeal it is taken up for early hearing and posted for final disposal on 11-9-2008 at 11.30 hrs subject to compliance of the stay order as above.

As the petitioner did not communicate compliance with the conditions of the stay order but filed a petition requesting for reconsideration and modification of the aforesaid stay order, the Commissioner dismissed the main appeal on the ground of non-compliance with the requirement of Section 35F of the Central Excise Act 1944. The petitioner preferred appeal against the order dismissing the appeal before the Customs, Excise & Service Tax Appellate Tribunal, Kolkata and by order dated 17-3-2009 the Tribunal holding that the case was not fit case for total waiver of duty directed the petitioner to deposit Rs. 4,00,000.00 within a period of six weeks set aside the order of dismissal of the appeal and remanded the appeals to the Commissioner (Appeals) to decide on merit on showing the above mentioned deposit and after affording an opportunity of hearing to the petitioner. The petitioner sought review of the aforesaid order in MAs.-(ROM)-200-202/09 which was rejected by the Tribunal as the Tribunal has no power of review. On remand the appeals were taken up by the Commissioner (Appeals) on 18-8-2009. The Commissioner observed that the directions given by the Tribunal to deposit Rs. 4,00,000.00 as pre-deposit for availing the right of appeal had not been complied by the petitioner in spite of efflux of time of about five months and therefore it has lost the right of appeal without any further action. So holding, the Commissioner disposed of the appeals.

4. Perusal of the above impugned orders show that the appeal has been disposed of on the ground of non-compliance of the order of the Tribunal to make the deposit of Rs. 4,00,000.00. No decision has been taken on merit with regard to the question of waiver. Therefore, the appeal involves substantial question of law as to whether the Commissioner (Appeals) could reject the application for waiver by non-Speaking order without assigning any reason.

5. Principle of natural justice requires that there should be proper application of mind in taking a decision which cannot be possible without giving reason.

6. In view of the above, this Court is of the opinion that the application for waiver could not have been rejected without assigning any reason by a non-speaking order which shows non-application of mind. Therefore, the impugned order is liable to be set aside and the matter is liable to be remanded to the Commissioner (Appeals) for reconsideration of the application for waiver.

7. In the result, the impugned order is set aside and the matter is remitted to the Commissioner (Appeals) for reconsideration of the application for waiver with a direction that the appeal as well as the application for waiver shall be restored to their original numbers and the waiver application shall be considered again after providing opportunity of hearing to the parties concerned without being

influenced by the orders dated 17-3-2009 and 24-7-2009 (vide Annexures-15 and 17) passed by the Customs Excise & Service Tax Appellate Tribunal and a reasoned order shall be passed thereon taking into consideration the pleadings of the parties as well as the case laws laid down by the High Courts and the apex Court.

8. The writ petition is accordingly disposed of.

9. Urgent certified copy may be granted on proper application.